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No. 567

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

THE GEORGE F. HAZELWOOD COMPANY,
A MARYLAND CORPORATION,

Appellant,

vs.

J. STANLEY PITSENBARGER, ASSESSOR
OF PENDLETON COUNTY, WEST VIRGINIA,

Appellee,

On Appeal From The Supreme Court of Appeals
Of The State of West Virginia

REPLY BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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Attorneys for the Appellant

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INTRODUCTORY

J. Stanley Pitsenbarger, Assessor of Pendleton County, West Virginia, appellee herein, has timely filed a printed "Brief for the Appellee in opposition to Jurisdictional Statement." The only provision made by the Revised Rules of the Supreme Court of the United States for reply by an appellee to a jurisdictional statement filed by an appellant is that which is set forth in Rule 16, "Motions to Dismiss or Affirm." Therefore, appellant will reply thereto on the theory that the Brief filed by appellee constitutes a motion to dismiss and a note of argument in support thereof.

ARGUMENT

Rule 16 (1) (a) of the Revised Rules of this Court provides that "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court because not taken in conformity to statute or to these rules." No contention is made by counsel for the appellee that this Court lacks jurisdiction under 28 U.S.C.A. sec. 1257 (2) and sec. 2101 (c), which were cited and relied on by appellant in its Jurisdictional Statement heretofore filed, or that appellant has in any way failed to comply with the Revised Rules of this Court.

Rule 16 (1) (b) provides that: "The court will receive a motion to dismiss an appeal

from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis." No contention is made by counsel for the appellee that the federal constitutional question involved in this appeal was not timely or properly raised or expressly passed on, or that such question is not substantial, or that the judgment rests on an adequate non-federal basis. On the contrary, appellee expressly admits all of "the facts as set forth in the second section of appellant's jurisdictional statement entitled 'Jurisdiction'." (See **Brief for Appellee,** p. 1) Further, the headnote to the fourth section of appellee's Brief expressly states "The questions are substantial," (**Id.,** p. 6), and no mention whatsoever is made of any possible non-federal basis for the judgment of the Supreme Court of Appeals of West Virginia in reversing the judgment of the Circuit Court of Pendleton County in this case. However the appellee does say, in the Conclusion of his Brief, that: "The fact that appellant's property acquired a new tax situs in Maryland, and was taxed again, does not give rise to a Federal question." (**Id.,** p. 21)

On the other hand, the Circuit Court of Pendleton County, West Virginia, expressly based its reversal of the ruling of the County Court on the legal conclusion that the action

of the appellee in assessing 1962 taxes against appellant's tangible personal property, on these facts, was "in violation of the due process clause of the 14th Amendment to the Constitution of the United States." (See **Jurisdictional Statement,** Appendix "A" p. 18) This federal constitutional issue was briefed and argued by appellant in the Supreme Court of Appeals of West Virginia, and, although it was not specifically mentioned in the opinion (See **Jurisdictional Statement,** Appendix "B" pp. 20-32) the Supreme Court of Appeals reversed the judgment of the Circuit Court and has subsequently certified to this Court as follows:

> ". . . that **decision of the federal constitutional issue** raised in Pages 13-20 inclusive of the printed brief filed herein by Defendant in Error and in Pages 3-15 inclusive of the Petition for Rehearing and Note of Argument filed herein by Defendant in Error, to-wit: **whether or not the taxes sought to be imposed by the Plaintiff in Error on the Defendant in Error for the year 1962 constitute a taking of property of the Defendant in Error without due process of law in violation of the 14th Amendment to the Constitution of the United States, was necessary to our judgment in the above styled proceeding."** See Appendix "B," **infra** (emphasis supplied).

This certificate may properly be considered by this Court. **Lynumn v. Illinois,** 368 U.S.

908, 82 S.Ct. 190, 7 L.Ed.2d 128 (1961); **Id.**, 370 U.S. 933, 82 S.Ct. 1576, 8 L.Ed.2d 805 (1962); **Id.**, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963)

Appellee also expressly admits the allegations of fact set forth in the "Statement of Facts" included in appellant's Jurisdictional Statement (pp. 5, 6) except for the allegation that the taxes here in issue were for the calendar year 1962 (see **Brief for Appellee,** pp. 5 and 19). This last allegation of fact is not denied, but counsel for the appellee say that "**doubt still exists** as to whether the tax levied on July 1, 1961, is for the calendar year 1962 or for the fiscal year 1962-63." **Ibid.** (emphasis supplied) We submit that this question was expressly decided once and for all by the Supreme Court of Appeals in this very case, when it said:

> "... after the Legislature amended the assessment statute in 1961 and placed it on a fiscal year basis, that is, from July 1 until June 30, **the tax year still remained on a calendar year basis,** in which manner property, both personal and real, had been assessed and taxed for many years ..." **The George F. Hazelwood Company v. Pitsenbarger,** 149 W.Va. ——, 141 S.E.2d 314, 317 (1965); Jurisdictional Statement, Appendix "B", pp. 25-26 (emphasis supplied)

Such a decision by the highest court of the State of West Virginia, construing a new

amendment to a West Virginia statute, is not subject to review by this Court. See **Brinkerhoff-Faris Trust Co. v. Hill,** 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, 1113 (1929); **Fox River Paper Co. v. Railroad Commission,** 274 U.S. 651, 655, 47 S.Ct. 669, 71 L.Ed. 1279, 1283 (1927)

The sole basis for appellee's Brief appears to be a contention that the Supreme Court of Appeals of West Virginia was correct on the merits when it reversed the judgment of the Circuit Court of Pendleton County. We submit that the ruling of the Supreme Court of Appeals was in direct conflict with the decisions of this Court in the cases cited in our Jurisdictional Statement and is therefore clearly wrong. Further, as hereinafter stated, the issue presented here directly affects many states and indirectly, at the least, affects citizens of all of the states, and for that reason is not only substantial but is also of public importance.

Some state property tax statutes do not specify the tax year for which ad valorem taxes on tangible personal property are imposed. Most states, like Maryland (see **Jurisdictional Statement**, p. 9), use a January 1st annual assessment date and provide, by statute, administrative regulation or judicial decision, that the taxes assessed are for the calendar year in which the assessment is made. (See, e.g. **Alaska Statutes,** Sec. 29.10.396;

Arkansas Statutes of 1947, Sec. 13-102, 103; **Id.** Sec. 84-426; **Florida Statutes,** Sec. 193.11; **Georgia Code of 1933,** Sec. 92-6202; **Revised Laws of Hawaii of 1955,** Title 16, Sec. 128-3) So long as the assessment date for any state is within the tax year, the federal constitutional problem presented by this case cannot arise, since, in order to come within the terms of the state assessment statute, the tangible personal property involved must necessarily be within the taxing state at some time within the tax year, thereby receiving at least some degree of benefit and protection from the laws of the taxing state during the year for which the taxes are imposed.

However, not only West Virginia but a substantial number of other states have taxing statutes which place the assessment date outside the tax year. Arizona, for example, uses a January 1st annual assessment date, but the taxes are imposed for the fiscal year beginning the succeeding July 1st (**Arizona Revised Statutes,** 1956, Sec. 42-221). California uses the 1st Monday in March of each year as the assessment date, but the taxes are for the fiscal year beginning the succeeding July 1st (**California Assessment and Taxation Code,** sec. 405). The assessment date in Maine is April 1st but the taxes assessed are for the ensuing fiscal year **(Revised Statutes of Maine, 1954,** Ch. 91-A, Sec. 3). Montana uses the 1st Monday in March as its assessment date for taxes for the fiscal year beginning the follow-

ing July 1st (**Montana Revised Codes of 1947,** Sec. 84-406). Similar provisions are found in the tax statutes of New Jersey, Oklahoma and Oregon. None of these statutes is unconstitutional per se, but when any of these statutes is applied to movable tangible personal property, especially that owned by non-residents of the taxing state, it is manifest that the danger of multiple taxation and consequent unjust tax burden is very great. Moreover, there will be many instances like the situation in the case at bar, where a state will seek to tax tangible personal property of a resident of another state for a tax year during which such property receives from its laws none of "the opportunities, benefits and protection which 'due process' demands as pre-requisite for taxation." **Central Railroad Company of Pennsylvania v. Pennsylvania,** 370 U.S. 607, 611, 612, 82 S.Ct. 1297, 8 L.Ed.2d 720, 725 (1962)

CONCLUSION

In conclusion, counsel for the appellant would like to re-iterate their sole contention herein, to-wit: that the State of West Virginia did not have jurisdiction, under the "due process" clause of the 14th Amendment to the Constitution of the United States, to impose a tax for the calendar year 1962 on tangible personal property of the appellant, a Maryland corporation, which was not in the State of West Virginia at any time during that

year. To the extent that Chapter 11, Article 3, Section 1 of the Code of West Virginia, as amended by Chapter 142 of the Acts of the West Virginia, regular session, 1961, was construed and applied to impose such a tax on the appellant, on these facts, we submit that such statute is repugnant to and invalid under the federal constitution.

This is the only issue presented by this appeal, and this issue had never been presented to or decided by any court, state or federal, until the decision here appealed from. The fact that Maryland also taxed this same property for the same calendar year illustrates the injustice and hardship which can result when states exceed their jurisdiction in this regard, but appellant's case in no way depends on the fact that such tax was imposed by Maryland. Moreover, as above stated, the federal question presented is substantial and of public importance. Therefore appellee's motion to dismiss should be refused, probable jurisdiction should be noted and this appeal should be given plenary consideration by this Court.

Respectfully submitted,

Joseph A. Blundon
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126 East Street
Keyser, West Virginia
Attorneys for the Appellant

APPENDIX "A"

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of October, 1965, the following order was made and entered, to-wit:

In the Matter of The George F. Hazelwood Company, a corporation, Plaintiff Below, Defendant in Error

vs. 12360

J. Stanley Pitsenbarger, Assessor Pendleton County, Defendant Below, Plaintiff in Error

This day came the George F. Hazelwood Company, Defendant in Error, by Joseph A. Blundon, one of its attorneys, and requested the Court that a certificate be issued stating whether or not the Federal Constitutional issue raised in the brief of defendant in error and in the Petition for Rehearing filed by defendant in error, to-wit: whether or not the taxes sought to be imposed by the plaintiff in error on the defendant in error for the year 1962 constitute a taking of property of the defendant in error without due process of law in violation of the 14th Amendment to the

Constitution of the United States, was necessary to the judgment of this Court in the above styled proceeding, and, the Court being of opinion that such Federal Constitutional issue was decided and was necessary to such judgment, it is ordered that the President of this Court be authorized to issue and execute such certificate.

A True Copy

Attest: /s/ Kenneth E. Hines

Clerk Supreme Court of Appeals

APPENDIX "B"

In The Supreme Court of Appeals of West Virginia

In the Matter of THE GEORGE F. HAZELWOOD COMPANY, a corporation, Plaintiff Below, Defendant in Error,

vs. No. 12360

J. STANLEY PITSENBARGER, ASSESSOR OF PENDLETON COUNTY, Defendant Below, Plaintiff in Error,

CERTIFICATE

In response to a request by counsel for The George F. Hazelwood Company, Defendant in Error in the above styled proceeding lately pending in this Court and now pending in the Supreme Court of the United States, we hereby certify that decision of the federal constitutional issue raised in Pages 13-20 inclusive of the printed brief filed herein by Defendant in Error and in Pages 3-15 inclusive of the Petition for Rehearing and Note of Argument filed herein by Defendant in Error, to-wit: whether or not the taxes sought to be imposed by the Plaintiff in Error on the Defendant in Error for the year 1962 constitute a taking of

property of the Defendant in Error without due process of law in violation of the 14th Amendment to the Constitution of the United States, was necessary to our judgment in the above styled proceeding.

/s/ Chauncey Browning
President of the Supreme Court of Appeals of West Virginia

Attest:
/s/ Kenneth E. Hines
Clerk

END